

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

Tyrone A. Brown,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:04 CV 304 ERW
	)	DDN
Charles Dwyer,	)	
	)	
Respondent.	)	

**REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the court upon the petition of Missouri state prisoner Tyrone A. Brown for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition in accordance with 28 U.S.C. § 636(b).

**I. BACKGROUND**

On October 19, 2001, petitioner pled guilty in two different cases in the Circuit Court of St. Louis County to one count of second degree murder,<sup>1</sup> one count of first degree assault,<sup>2</sup> and two counts of armed criminal action. (Doc. 7, Ex. A at 13-17, 33-36.) Petitioner was sentenced to concurrent terms of 30 years imprisonment for the murder and related armed criminal action (id. at 33-36.); and, to concurrent terms of 30 years imprisonment for the assault and related armed criminal action. (Id. at 13-17.) The circuit court ordered the pairs of concurrent 30 year sentences to be served consecutively, for a total of 60 years in the custody of the Missouri Department of Corrections. (Id. at 15-16, 35-36.)

Petitioner filed a motion for post-conviction relief pursuant to

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<sup>1</sup> By information filed in Cause No. 99CR-2742, petitioner was charged with the killing of Vanilla Brown on June 17, 1999. (Doc. 7, Ex. A at 26.)

<sup>2</sup> By amended information filed in Cause No. 98CR-5824, petitioner was charged with assault on Theatrice Caine on November 15, 1998. (Id. at 8.)

Missouri Supreme Court Rule 24.035. (Doc. 7, Ex. A at 77-82.) The circuit court denied the motion without a hearing on July 29, 2002. (Id. at 99-106.) The Missouri Court of Appeals affirmed the denial of post-conviction relief. See Brown v. State, 105 S.W.3d 517 (Mo. App. 2003). Brown filed his pro se petition for a writ of habeas corpus in this court, alleging 6 grounds for relief:

- (1) Brown's guilty plea was involuntary because the circuit court did not properly consider evidence of his mental state;
- (2) Brown's guilty plea was involuntary because the circuit court did not clearly inform him of the meaning of "concurrent" or "consecutive," nor did the circuit court determine Brown's clear understanding of the terms;
- (3) his trial counsel rendered ineffective assistance of counsel for telling Brown that he could receive the death penalty for first degree murder alone and that he could receive life imprisonment for first degree assault and armed criminal action;
- (4) trial counsel rendered ineffective assistance of counsel for telling Brown that his mental instability was not a reliable defense, which induced Brown to agree to the amended plea bargain;
- (5) trial counsel rendered ineffective assistance of counsel for failing to explain to Brown the meanings of "consecutive" and "concurrent"; and
- (6) trial counsel rendered ineffective assistance of counsel for failing to adequately investigate Brown's mental state.

(Doc. 1 at 5.)

Respondent argues that Grounds 1, 3, 4, and 6 are procedurally barred from review by this court, because they were never presented to the Missouri circuit court in the post-conviction relief motions. Respondent argues that Grounds 2 and 5 are without merit.

## **II. EXHAUSTION OF STATE REMEDIES AND PROCEDURAL BAR**

To qualify for federal habeas corpus review, a Missouri state prisoner must have first fully exhausted all available state remedies for each ground he presents in federal court. See 28 U.S.C. § 2254(b)(1)(A), (c). Coleman v. Thompson, 501 U.S. 722, 731 (1991); Sloan v. Delo, 54 F.3d 1371, 1381 (8th Cir. 1995), cert. denied, 516

U.S. 1056 (1996). Failure to raise a ground at any stage of a direct appeal or post-conviction motion proceeding in the state courts erects a procedural bar to relief on that ground in this court. Sweet v. Delo, 125 F.3d 1144, 1149-50 (8th Cir. 1997), cert. denied, 523 U.S. 1010 (1998); see also Coleman, 501 U.S. at 731.

Respondent contends that all of Brown's grounds are exhausted but that grounds 1, 3, 4, and 6 are procedurally barred. A review of the record confirms this contention. Brown raised Grounds 2 and 5 in his post-conviction relief motion and they were ruled by the Missouri Court of Appeals. Thus, this court should address the merits of these grounds. (Doc. 7, Ex. A at 88, 94.) Brown did not raise Grounds 1, 3, 4, and 6 in his post-conviction relief motions and thus these grounds are procedurally defaulted. (Doc. 7, Ex. A at 87-96.)

A federal habeas court is unable to address the merits of a ground that the state courts did not address, unless the petitioner can (1) demonstrate legally sufficient cause for not presenting the ground in state court and actual prejudice resulting therefrom, or (2) demonstrate that failure to consider the ground will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. The doctrine applies whether the procedural default occurred at trial, on appeal, or on state collateral attack. See Murray v. Carrier, 477 U.S. 478, 486-88 (1986).

In order to establish cause for procedural default under the first exception, petitioner must demonstrate that "some objective factor external to the defense" impeded his efforts to comply with the state's procedural requirements. Murray, 477 U.S. at 488; Cornman v. Armontrout, 959 F.2d 727, 729 (8th Cir. 1992).

Brown has not demonstrated cause for failing to present Grounds 1, 3, 4, and 6 in state court, nor does he allege actual prejudice. Thus these grounds remain barred under the first exception.

A petitioner may also avoid the procedural bar by demonstrating that failure to consider a defaulted ground for relief will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. A fundamental miscarriage of justice would occur if petitioner were actually innocent. Murray, 477 U.S. at 496. In this regard, Brown must show new and reliable evidence to sustain a claim of actual innocence

and establish that it is more likely than not that no reasonable factfinder would have convicted him in light of this new evidence. Schlup v. Delo, 513 U.S. 298, 327 (1995).

Brown does not allege he is actually innocent of the crimes of which he is convicted. Additionally, the Eighth Circuit Court of Appeals has found that "in light of a guilty plea, . . . an attempt [to show actual innocence] would be unpersuasive." McCall v. Benson, 114 F.3d 754, 758 (8th Cir. 1997). Thus, since Brown entered a guilty plea to the subject charges and does not allege his actual innocence, Grounds 1, 3, 4, and 6 remain procedurally barred.'

### III. STANDARD OF REVIEW AND MERITS

Federal habeas relief may not be granted on Ground 2 or Ground 5 by this court unless the state court adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(d) (1)-(2).

"A state court's decision is contrary to clearly established law 'if the controlling case law requires a different outcome either because of factual similarity to the state case or because general federal rules require a particular result in a particular case.'" Tokar v. Bowerson, 198 F.3d 1039, 1045 (8th Cir. 1999), cert. denied, 531 U.S. 886 (2000) (quoting Richardson v. Bowersox, 188 F.3d 973, 977-78 (8th Cir. 1999)).

When deciding whether a state court unreasonably applied federal law, a federal habeas court should ask "whether the state court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000) (plurality opinion). In Williams, the Supreme Court distinguished an *unreasonable* application of federal law from an *incorrect* application of federal law. Id. at 411. "[A] federal habeas court may not issue the writ simply

because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. When appraising whether a decision was based on an unreasonable determination of the facts, a state court's determination of a factual issue is presumed to be correct and must be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

## Ground 2

Brown alleges that his guilty plea was involuntary because the Missouri circuit court did not clearly inform him of the meanings of "concurrent" and "consecutive," nor did the circuit court determine that he clearly understood the terms. Respondent argues that the court transcript illustrates that Brown understood he was pleading guilty to two separate and consecutive 30 year prison terms. Brown was represented by different counsel for Cause No. 99CR-2742, the murder case, and Cause No. 98CR-5824, the assault case, during his plea and sentencing hearing. (Doc. 7, Ex. A at 2-3.) Each attorney entered a guilty plea on behalf of Brown. (Id. at 3-4.) The Assistant Prosecuting Attorney recommended that Brown be sentenced to two concurrent terms of 30 years for Cause No. 99CR-2742, and two concurrent terms of 30 years for Cause No. 98CR-5824. (Id. at 4-5.) The following colloquy then occurred:

Q. [The Court] Do you understand that you're gonna be sentenced here today to 30 years incarceration as to Count 1, Murder in the Second Degree?

A. [Brown] Yes, Your Honor.

Q. And also as to Count 2, Armed Criminal Action, 30 years concurrently

A. Yes, Your Honor.

Q. However, that's to be run consecutively to the 98CR case of 30 years, as well as -- of Assault, as well as 30 years on the Armed Criminal Action?

A. Yes, sir.

Q. 30 years concurrently on Count 2. For a total of the

first case 30 years consecutively with 30 years?

A. Yes, Your Honor.

(Doc. 7, Ex. A at 41-42.)

The court then questioned whether the medication Brown was taking was affecting him and whether he understood the proceedings. (Doc. 7, Ex. A at 44.) Brown responded "Yes, sir, I understand, Your Honor." (Id.) The court asked each attorney whether he and she believed that Brown understood the proceedings and each answered affirmatively. (Id.) The court then questioned Brown about his pleas, asking, "And I believe, to your understanding, the reason why these charges were amended this way was because of the plea bargain agreement in this case of 30 years plus 30 years?" (Id. at 46.) Brown responded, "Yes, sir." (Id.) The court later probed Brown's understanding of the proceedings, asking:

Q. [The Court] And you're clear headed here today?

A. [Brown] Yes, sir.

Q. And everything is clear to you?

A. Yes, sir.

Q. Now, do you have any questions about--if you have any questions about anything just let me know, okay?

A. Okay.

(Id. at 52.)

The Missouri Court of Appeals ruled Brown's grounds as follows:

The record refutes movant's claims. The court not only explained the sentences in terms of "concurrent" and "consecutive" time, but also established in plainer language that movant understood that the sentence was thirty years "plus" thirty years. Movant twice indicated that he understood the proceedings and his attorneys testified that he understood. The court informed movant that he could ask about anything he did not understand, but movant did not question the length of the sentence.

"While an individual may proclaim he had a certain belief and may subjectively believe it, if it was unreasonable for him to entertain such a belief at the time of the plea proceeding, relief should not be granted." McMahon v. State, 569 S.W.2d 753, 758 (Mo. banc 1978).

"Where there is no reasonable basis for relief in light of the guilty plea record, movant is not entitled to relief." Id.

As in McMahon, whatever movant's subjective belief may have been on receiving concurrent sentences in both cases, the trial court disabused movant of his belief with its meticulous questioning of movant at the time he entered his guilty plea. The record demonstrates no reasonable basis for movant to believe that his sentences on the two cases would run concurrently with each other. He did not establish that his plea was involuntary on this basis. Id. See also State v. Rice, 887 S.W.2d 425, 427-28 (Mo. App. 1994); Torrence v. State, 861 S.W.2d 149, 151 (Mo. App. 1993).

(Doc. 7, Ex. D at 5.)

The Missouri Court of Appeals decision was not contrary to, nor an unreasonable application of, law, in light of United States Supreme Court precedent. According to the Supreme Court, the standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action available to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). The Missouri Court of Appeals applied the standard set out in McMahon v. State, 569 S.W.2d 753 (Mo. 1978), to determine whether Brown's plea was voluntary in each case. The standard under McMahon for determining the validity of a guilty plea, where the prisoner later alleged he pled guilty believing he was to receive a lesser sentence than the one he was later required to serve, is whether the prisoner had a reasonable basis for entertaining his alleged belief at the time of the plea. McMahon, 569 S.W.2d at 758. The Missouri Court of Appeals noted that the trial court meticulously questioned Brown when he entered his guilty pleas. The record shows that Brown repeatedly expressed his acceptance and understanding of the terms of his guilty pleas and the resulting sentences, including the difference between "concurrent" and "consecutive" terms of imprisonment, especially when the circuit said the sentences would be 30 years plus 30 years imprisonment. (Doc. 7, Ex. at 41- 42, 46.) The record shows that Brown had no reasonable basis for misunderstanding the terms. Thus, his plea was a voluntary and intelligent choice under state and federal standards.

Nor did the Missouri Court of Appeals base its decision on an unreasonable determination of facts. There is a substantial factual basis in the record to support the conclusion that Brown understood the real consequences of his plea and voluntarily agreed to his guilty plea. The court made clear reference to each distinct cause number when accepting Brown's pleas and administering the separate sentences. The court also questioned Brown several times about the plea bargains and sentences. Brown did not ask any questions about the terms "concurrent" and "consecutive" or the length of his sentences. Thus, the Missouri Court of Appeals decision did not involve an unreasonable determination of facts.

Ground 2 is without merit.

#### Ground 5

Brown alleges in ground 5 that trial counsel rendered ineffective assistance of counsel for failing to explain to him the meanings of "consecutive" and "concurrent" in relation to his terms of imprisonment. Respondent points to the record to show that Brown knew the consequences of his guilty pleas after consulting with this attorneys. Attorney Michael Sullivan represented Brown for Cause No. 98CR-5824, the assault and armed criminal action charges filed in 1998. (Doc. 7, Ex. A at 13, 37.) Stormy White represented Brown for Cause No. 99CR-2742, the murder and armed criminal action charges filed in 1999. (Id. at 33.) The record reflects that Brown consulted with Sullivan and White about each case and was satisfied with their assistance. Brown testified at the plea and sentencing hearing as follows:

Q. [The Court] In this courtroom you discussed these cases with both of your attorneys here today, is that correct?

A. [Brown] Yes, sir.

Q. And other times have you discussed these cases with your attorneys?

A. Yes, sir.

Q. Okay. And the times that you have had with your



attorneys do you believe that that was sufficient?

A. Yes, sir.

Q. Have they done everything that you wanted them to do?

A. Yes, sir.

(Doc. 7, Ex. A at 66.)

Q. Do you have any complaints about their representations that I need to know here today?

A. No, sir.

Q. You're satisfied with their representations, whether or not you're satisfied with the outcome of this case?

A. Yeah, I'm satisfied, yes.

Q. Now, your plea bargain agreement was a result of a -- well, negotiation with you involved, is that correct?

A. Yes, sir.

Q. And not only did you discuss it with your attorneys but did you discuss it with anybody else about your plea bargain agreement?

A. No, sir.

Q. Do you believe your attorneys forced you or caused you or induced you in any way to enter a plea of guilty?

A. No, sir.

Q. Okay. Court will note that the Defendant has been advised and examined pursuant to Rule 29.07. No probable cause exists to believe that the Defendant has received ineffective assistance of counsel in this case.

(Doc. 7, Ex. A at 69.)

The Missouri Court of Appeals noted that "[w]hen a movant pleads guilty, claims of ineffective assistance of counsel are only relevant as they affect the voluntariness and understanding with which the plea was made." (Doc. 7, Ex. D at 3) (quoting Holland v. State, 954 S.W.2d 600, 661 (Mo. App. 1997)). To establish that counsel was ineffective under the federal standards, Brown must satisfy a two-prong test. See Strickland

v. Washington, 466 U.S. 668 (1984). First, he must show that each counsel's performance was so deficient that it fell below the standard for counsel guaranteed by the Sixth Amendment. Id. at 687. Second, Brown "must show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

In Roberson v. United States, 901 F.2d 1475, 1478 (8th Cir. 1990), the Eighth Circuit found that counsel provided adequate representation based on the defendant's statements that "his counsel had handled this case to his satisfaction, that she had done everything he had asked her to do, and that she had not refused to do anything that he wanted her to do."

Here, Brown acknowledged after sentencing that he had no complaints about his counsel, that he was satisfied with their representation, and that counsel had done everything he wanted them to do. (Doc. 7, Ex. A at 66, 69.) Even if Brown shows that his attorneys' performance was deficient, he has failed to satisfy the second prong of the ineffective counsel test. Brown has not demonstrated actual prejudice from the alleged failure of counsel to define "consecutive" and "concurrent." Brown has not shown that there was a reasonable probability of his going to trial because of this error, because of the colloquy between Brown and the court, set forth above. The circuit judge at the plea hearing noted that, without the plea bargain, Brown could have received "up to life" for each armed criminal action charge, up to fifteen years for the Class B assault, and "life without probation or parole or death" for murder in the first degree. (Doc. 7, Ex. A at 45-46, 71.) Thus, it is not reasonably, objectively probable that, had Brown been aware of the distinction between "consecutive" and "concurrent," he would have proceeded to trial and risked receiving life in prison, instead of accepting the known sixty year sentence offered by the State for his guilty plea.

Furthermore, Brown's statements at the plea hearing support the circuit court's and appellate court's rulings. The circuit judge asked Brown if he understood the outcome of the plea bargain agreements which was "30 years plus 30 years," to which Brown responded "Yes, sir." (Doc.

7, Ex. A at 46.) As the excerpt from the record above indicates, Brown also answered affirmatively when asked whether he had discussed each plea and the terms of imprisonment for each plea with his counsel. (Id. at 11.) Nor did Brown ever voice any confusion about the terms of imprisonment to the judge during the plea hearing. The record thus supports the Missouri courts' finding that he understood the meaning of "consecutive" and "concurrent."

Furthermore, during the plea hearing, the assistant prosecuting attorney discussed the concurrent thirty year terms of imprisonment for 99CR-2742, and then explained the concurrent thirty year terms of imprisonment for 98CR-5824, noting the consecutive nature of the sentences for each cause number. The judge further clarified the total sentence for both cases by using the language, "30 years plus 30 years." Thus, it was reasonable for Brown's counsel to assume that he understood the separate sentences of the two cases and the combined total sentence of 60 years.

Thus, because Brown was not prejudiced by any failure of counsel to explain the meaning of his sentencing terms, the Missouri Court of Appeals decision is neither contrary to, nor an unreasonable application of, federal law, and it is not based on an unreasonable determination of the facts.

Ground 5 is without merit.

#### IV. RECOMMENDATION

For the reasons stated above, it is the recommendation of the undersigned United States Magistrate Judge that the petition of Tyrone A. Brown for a writ of habeas corpus be dismissed with prejudice. Any pending motions should be denied as moot.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to file timely written objections may result in a waiver of the right to appeal issues of fact.

A handwritten signature in black ink, appearing to read "David D. Noce", written over a horizontal line.

DAVID D. NOCE  
UNITED STATES MAGISTRATE JUDGE

Signed on December 14, 2005.